IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-1862

ADVOCATES FOR THE ARTS, et al.,
Petitioners
v.
MELDRIM THOMSON, JR.
GOVERNOR OF THE STATE OF
NEW HAMPSHIRE, et al.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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In the Supreme Court of the United States
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No.

Advocates for the Arts, et al., Petitioners

v.

Meldrim Thomson, Jr.,
Governor of the State of New Hampshire, et al., Respondents

Petition for a Writ of Certiorari
To the United States Courts of Appeal for the First Circuit

The petitioners, Advocates For The Arts, Granite Publications Incorporated, Rosellen Brown, Douglas K. Morse, and Vera Vance respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this proceeding on March 31, 1976.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. The opinion of the United States District Court for the District of New Hampshire is reported at 397 F. Supp. 1048.

JURISDICTION

The judgment of the Court of Appeals for the First Circuit was entered on March 31, 1976. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254 (1).

QUESTION PRESENTED

Whether, in revoking a grant of funds provided by The National Endowment For The Arts, on the basis of their personal prejudices against the use of certain language, the Governor and Executive Council of the State of New Hampshire abridged the First and Fourteenth Amendment rights of a literary magazine, its contributors and readers.

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in relevant part:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; . . . ."

The first section of the Fourteenth Amendment to the United States Constitution is as follows:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

The National Endowment for the Arts (hereinafter referred to as the "National Endowment") was created by Congress as part of the National Foundation on the Arts and Humanities. Pursuant to 20 U.S.C. §954 (g) the National Endowment carries out a program of grants in aid to various State

agencies which in turn administer the funds consistent with the purposes of the act.[1]

The New Hampshire agency which receives and administers National Endowment funds is the New Hampshire Commission on the Arts (hereinafter referred to as the "Commission"). In fiscal 1974, the Commission received One Hundred Fifty Thousand Dollars ($150,000.00) as a bloc grant under 20 U.S.C. §954 (g). The Commission receives applications for funds from various individuals, groups, or organizations seeking financial support for programs connected with the arts. The Commission determines whether certain financial and administrative requirements have been met, and then reviews the applications in order to ascertain whether the project is of sufficient artistic or literary merit to warrant a grant of National Endowment funds. If an application is approved, the Commission executes a contract with the applicant which contract is then forwarded to the Respondents, the Governor and Executive Council of the State of New Hampshire, so that the funds so awarded may be disbursed.[2]

Petitioner, Granite Publications, Inc., (hereinafter referred to as "Granite"), is a non-profit corporation which publishes, in Hanover, New Hampshire, a journal of poetry, fiction, translations and letters under the title *Granite*. *Granite* was founded in 1971, and rapidly became known as a magazine of high literary endeavor.

On July 29, 1972, *Granite* applied to the Commission for a grant of National Endowment funds. The Commission determined that the journal was of sufficient literary merit and

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[1] In the Declaration of Purpose, Congress stated, among other things: ". . . that the practice of art and the study of the humanities requires constant dedication and devotion and that, while no government can call a great artist or scholar into existence, *it is necessary and appropriate for the Federal Government to help create and sustain not only a climate encouraging freedom of thought, imagination, and inquiry, but also the material conditions facilitating the release of this creative talent;*" 20 U.S.C. §951 (5) (emphasis added)

[2] Funds awarded by the National Endowment are first placed in the State Treasury. In order for any of those funds to be withdrawn, a warrant must be issued from the Governor and the Executive Council authorizing the withdrawal. New Hampshire Revised Statutes Annotated 4:14.

made an award of Nine Hundred Fifty Dollars ($950.00). This grant was subsequently approved by the Respondents, the Governor and Executive Council. The National Endowment funds allowed *Granite* to maintain its standards of excellence and, indeed, to attract some of the best known poets in America.

The following year *Granite* again applied to the Commission for National Endowment Funds. Based upon its literary merits, the Commission again awarded funds to the journal. The contract which encompassed the award was approved and ratified by the Governor and the Executive Council at an Executive Council meeting on May 1, 1974. Shortly after the May 1st meeting had adjourned, the Respondents were shown one poem which had appeared in one back issue of *Granite*. Thereupon the meeting was reconvened and, based on one poem in one back issue, the award to *Granite* was revoked. The award was withdrawn by the Governor and Council solely because they thought it contained a poem which used off color language, or as the Governor characterized it, an "item of filth."[3] This action was taken without the benefit of any expert opinion as to the literary merits of the poem in question.

Subsequent to the revocation, the Governor wrote to the Commission and indicated that *Granite* would receive no further support from the Governor and Council because it had published "obscenities." As a direct result of the Respondents' action, *Granite* did not receive the National Endowment funds awarded by the Commission, and was forced to curtail and delay the publication of further issues.[4]

The Complaint in this case was filed in the United States District Court for the District of New Hampshire on April 15, 1975. The Petitioners are Advocates For The Arts, a non-profit organization created to promote the arts, Granite Publications, Inc., Rosellen Brown, an individual and a contributor to *Granite*, Douglas K. Morse, an individual and a member of Advocates, and Vera Vance, an individual member of Advocates who

[3]The poem is reprinted herein at p. 21 as an appendix to the decision of the Court of Appeals.

[4]This is an appeal from a motion to dismiss. All of the foregoing facts are based on the Complaint and affidavits, no Answer having been filed.

is both a contributor and subscriber to *Granite*. All individuals are residents of the State of New Hampshire. Advocates For The Arts sued on behalf of its members residing in New Hampshire.

The Complaint sought declaratory and injunctive relief and alleged that the action of the Governor and Council, in revoking the grant, constituted a violation of the First Amendment. Count II alleged that the same action constituted an unlawful impoundment of funds contrary to 20 U.S.C. §954 and New Hampshire Revised Statutes Annotated Chapter 19-A. The jurisdiction of the District Court was invoked pursuant to 28 U.S.C. §1331, 28 U.S.C. §1343 (3) , and 42 U.S.C. §1983.

The Respondents filed a motion to dismiss and requested that the Court treat the motion as a motion for summary judgment. The District Court, in a decision reported at 397 F. Supp. 1048 (D.N.H. 1975), held that all plaintiffs had standing to sue and that jurisdiction was properly invoked under 28 U.S.C. §1331. It then dismissed Count I for failure to make out a valid First Amendment claim. The Court went on to dismiss Count II, holding that under the statutory scheme, the Governor and Council had the discretion to take the action complained of and that no unlawful impoundment had occurred.

Pursuant to 28 U.S.C. §1291 Petitioners filed an appeal to the United States Court of Appeals for the First Circuit. The appeal sought review of the First Amendment issue only. On March 31, 1976, the Court of Appeals issued its decision affirming the judgment of the District Court. The Court of Appeals held that jurisdiction was properly invoked under 28 U.S.C. §1343 (3) and 42 U.S.C. §1983 and did not consider whether jurisdiction was proper under 28 U.S.C. §1331. It held that Granite Publications, Inc., had standing and did not consider the standing of the other plaintiffs. The First Circuit rejected Petitioners' reliance on the prior restraint doctrine and held, in short, that the problem was incapable of a constitutional solution.

REASON FOR GRANTING THE WRIT

THIS CASE PRESENTS AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW WHICH HAS NOT BEEN SPECIFICALLY DETERMINED BY THIS COURT.

The underlying question which is presented by this case is the extent to which the First Amendment applies to decision making regarding public funding of the arts. Petitioners submit that how this question is answered will have far reaching consequences in a society which seeks to encourage literary and artistic expression through a system of public grants.

Public funding of the arts is widespread. The fact that Congress has authorized the National Endowment for the Arts alone, to provide a minimum of Two Hundred Thousand Dollars ($200,000.00) in grants-in-aid to each State which has an approved plan, [20 U.S.C. §954 (g)], illustrates that such funding is becoming an increasingly important source of support for creative talent. Accordingly, although this is a case of first impression, this Court's review of the decision below will have a significant impact on that ". . . climate encouraging freedom of thought, imagination, and inquiry . . ." which the grant-in-aid system seeks to foster. 20 U.S.C. §951 (5). "Freedom of thought, imagination, and inquiry" will be stifled and creativity chilled if writers who hope to receive National Endowment funds are deprived of First Amendment protection.

The decision to award an arts grant necessarily involves the exercise of judgment and an evaluation of competing applicants. But, as this court made clear in *Perry v. Sindermann,* 408 U.S. 593 (1972) ". . . even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely . . ." 408 U.S. at p. 597. The government may not act as a censor without procedural safeguards. *Carroll v. President and Commissioners of Princess Anne,* 393 U.S. 175 (1968).

In the instant case, the Governor and Executive Council of the State of New Hampshire revoked an award to a highly

respected literary journal. The literary merit of the magazine was not even considered. The sole reason for the Respondents' action was their personal prejudice against certain vernacular terms that were used in a poem. The Complaint alleges that the withdrawal of the National Endowment funds forced the magazine to delay and curtail further publication. In effect, the Governor and Council's action was tantamount to censorship of *Granite* magazine. It was a censorship which not only affected *Granite,* but indirectly affects all working artists in New Hampshire who are cognizant of the Respondents' viewpoints and who desire to apply for public funding of the arts. Each such artist must consider whether he should mold his thought and modes of expression to conform to the tastes of the Governor and the Executive Council, if he wishes to apply for National Endowment funds.

Withdrawal of the award to *Granite* was similar to the action which this Court struck down as a prior restraint in *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546 (1975). In *Southeastern Promotions,* a municipal Board reviewed applications of those seeking to use a municipal theatre in Chattanooga, Tennessee. As with the award of National Endowment funds, approval by the Board in *Southeastern Promotions* ". . . was not a matter of routine; instead, it involved the 'appraisal of facts, the exercise of judgment, and the formation of an opinion' by the board." 420 U.S. at p. 554. The First Circuit below, considered it ". . . implicit in the Court's disposition of the case [*Southeastern Promotions*] that the decision must not turn on subjective official preferences . . ." (Appendix, Note 3, p. 17).

The Court found the denial of a valuable economic benefit — the use of the municipal auditorium — because the Board, based on its subjective preferences, considered the play "Hair" to be obscene, constituted a prior restraint because procedural safeguards were lacking. Petitioners submit that denial of a valuable economic benefit — the award of National Endowment funds — based upon the Governor and Executive Council's own personal responses to certain language used in a poem, is equally violative of the First Amendment.

Petitioners do not suggest that this Court should establish

guidelines for arts administrators to follow. There may be many justifiable reasons for the rejection of a potential applicant. But, a balance must be struck between the difficulties of inquiring into each administrative decision and the preservation of First Amendment rights. When it is clear that a decision was made for the wrong reasons, this Court should not hesitate to apply the First Amendment. To do otherwise, as the Court of Appeals has done, would be to declare that anyone who is applying for public funding of the arts must first give up his First Amendment rights.

The Court of Appeals in essence, proceeded on the assumption that decisions regarding public fundings of the arts ". . . will be made according to the literary or artistic worth of competing applicants . . ." (Appendix p. 16). On that basis it was reluctant to involve the Courts in the day to day decision-making process. However, where an award, made on the basis of literary or artistic merit, is revoked for an improper reason (the Governor and Council's personal predilections), a judicial refusal to interfere amounts to the sanctioning of an indirect system of censorship. The Court below has allowed public officials to use their unbridled descretion in a manner wholly at odds with the First Amendment. If the First Circuit Court's decision is allowed to stand, it may sow the seeds for the subversion of the entire process of public support for the arts.

Unless this Court grants this Petition, there is a very real danger that, rather than facilitating and enlarging artistic expression, public funding of the arts may become a device for shaping and controlling both the content and mode of artistic expression in this country. This danger is just as real as that posed by the broadly worded licensing ordinances which this Court did not hesitate to strike down in *Shuttlesworth v. Birmingham,* 394 U.S. 147 (1969), and *Cox v. Louisiana,* 379 U.S. 536 (1965), or the informal censorship system in *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58 (1963).

Any method of selecting applicants for public funding of the arts which allows decisions to be made without First Amendment protections will necessarily chill the very expression and communication of ideas which the public funding seeks to

foster. The effect of the decision below is to put a subtle but enormous pressure on any New Hampshire author or poet who would like to apply for National Endowment funds. This pressure will inevitably lead to a tempering of modes of expression if writers know that the Governor and Council disapprove of the use of certain words, even though they might have used those words to create a certain literary effect or to emphasize the message they wish to convey. Moreover, if the Governor and Council can exercise unbridled discretion as to the awarding of grants, there is the danger that only those who are willing to express viewpoints with which the Governor and Executive Council are sympathetic, would even apply for grants. Any New Hampshire writer who desires to apply for National Endowment Funds would have to consider whether his message might offend the Respondents. Such an atmosphere runs directly counter to the First Amendment, not to mention the legislative purpose of the National Endowment legislation. The vesting of discretion which would permit decisions regarding public funding of the arts to be made under these conditions is tantamount to granting the Respondents a license to place conditions on grantees in order to insure that only those ideas and modes of expression approved by them would receive public funding. Such a result must produce a chilling effect upon the exercise of First Amendment rights.

> ". . . freedom of speech . . . is . . . protected against censorship or punishment . . . there is no room under our consitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups." [Citations omitted. *Cox v. Louisiana,* 379 U.S. 536, 552 (1965)].

Petitioners submit that the decision of the Court of Appeals is in direct conflict with the intent and spirit of the First Amendment. It lays the groundwork for a "standardization of ideas." Time and again this Court has not hesitated to review decisions which could have far-reaching implications for the exercise of First Amendment freedoms. The opinion of the United States Court of Appeals for the First Circuit is such a decision.

CONCLUSION

For the foregoing reasons a writ a certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

ADVOCATES FOR THE ARTS,
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INCORPORATED, ROSELLEN
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APPENDIX

United States Court of Appeals
For the First Circuit

No. 75-1346

ADVOCATES FOR THE ARTS, et al.,
Plaintiffs, Appellants,

v.

MELDRIM THOMSON, JR., etc., et al.,
Defendants, Appellees.

Appeal from the United States District Court
for the District of New Hampshire
[Hon. Hugh H. Bownes, *U.S. District Judge*]

[397 F. Supp. 1048]

Before Coffin, *Chief Judge*,
McEntee and Campbell, *Circuit Judges*.

Howard B. Myers with whom *Ingram and Myers, Howard M. Squadron, Harvey Horowitz,* and *Squadron, Gartenberg, Ellenoff & Pesent* were on brief, for appellants.

Edward A. Haffer, Assistant Attorney General, with whom *Warren B. Rudman,* Attorney General, was on brief, for appellees.

March 31, 1976

CAMPBELL, *Circuit Judge*. The question in this case is whether the first amendment permits the Governor and Council of New Hampshire to refuse a grant-in-aid to a literary magazine because they regard a poem appearing in a past issue of the magazine as an "item of filth." The district court, treating the defendants' motion to dismiss as a motion for summary judgment under Fed. R. Civ. P. 12 (b) and 56, found no first amendment violation. 397 F. Supp. 1048 (D.N.H. 1975). We agree.

In 1965 Congress established the National Foundation on the Arts and the Humanities, 20 U.S.C. §§ 951 *et seq.*, in order "to help create and sustain not only a climate encouraging freedom of thought, imagination, and inquiry but also the material conditions facilitating the release of this creative talent . . ." *Id.* §951 (5). Within this foundation Congress established a National Endowment for the Arts with responsibility for awarding grants-in-aid, both directly to those groups and individuals whose artistic endeavors "have substantial artistic and cultural significance," *id.* §954 (c) (1), or are otherwise worthy of public support, *id.* §954 (c) (2)- (5) , and indirectly through state agencies established to serve the same purposes, *id.* §954 (g).

Responding to the federal legislation, the New Hampshire legislature established the New Hampshire Commission on the Arts (the Commission) to administer the grant program in New Hampshire. N.H. Rev. Stats. Ann. ch. 19-A. The legislature declared that "all activities undertaken by the state in carrying out [the program] shall be directed toward encouraging and assisting rather than in any way limiting the freedom of artistic expression that is essential for the well-being of the arts." *Id.* ch. 19-A:1. At first the legislature made no provision for executive review of the Commission's funding decisions, but under general provisions of the New Hampshire Constitution and laws calling for approval of treasury disbursements and department expenditures, N.H. Const., pt. 2, art. 56; N.H. Rev. Stats. Ann. ch. 4:15, the practice evolved that Commission grants of over $500.00 were submitted to the Governor and Council for their approval before becoming final. On July 5, 1975, while this litigation was before the district court, the legislature specifically provided for such approval by amendment to chapter 19-A. *Id.* ch. 19-A:6 (VI) (Supp. 1975) .

Granite is a journal of poetry, fiction, translations and letters that was first published in the spring of 1971. The first three issues, appearing in 1971-1972, were privately funded. An enlarged fourth issue, entitled *Northern Lights,* was supported by a grant-in-aid voted by the Commission and approved by the Governor and Council in mid-1972. The present controversy arose when *Granite's* publishers applied for a second grant in October 1973. On March 4, 1974, the Commission voted to

award a grant of $750.00. The Governor and Council at first determined to approve this grant, at a meeting on May 1, 1974. After the meeting was adjourned, however, the Governor and members of the Council were shown a poem in the *Northern Lights* issue of *Granite* entitled "Castrating the Cat."[1] They then reconvened the meeting and reversed their decision. At the time the Governor characterized the poem as "an item of filth," and in a letter notifying the Commission of the decision not to approve the *Granite* grant-in-aid explained that the magazine had published "obscenities."[2]

The complaint in this suit was filed on April 15, 1975. The plaintiffs are Granite Publications, the nonprofit corporation that publishes *Granite;* Advocates for the Arts, a national organization concerned with promotion of the arts, with members in New Hampshire; an individual member of Advocates of [sic] the Arts who resides in New Hampshire; and two individuals whose work appeared in the *Northern Lights* issue of *Granite,* one of whom is also a subscriber to the magazine. The complaint alleged that the Governor and Council, in disapproving the $750.00 grant-in-aid on the basis of their own "personal adverse reaction" to a single poem had violated the first and fourteenth amendments of the Constitution, as well as the federal and state statutes authorizing the grants program, 20 U.S.C. §954; N.H. Rev. Stats, Ann. ch. 19-A. Under 42 U.S.C. §1983 the plaintiffs sought declaratory and injunctive relief.

The district court found that federal jurisdiction was proper under 28 U.S.C. §1331 and that all of the plaintiffs had standing to sue. 397 F.2d 1048, 1049-50. On the merits the court sought to identify exactly what governmental conduct had aggrieved the plaintiffs. It considered that "[t]he only action taken by the defendants is their refusal to sanction the grant because, in their judgment, they do not believe the magazine worthy of State support." *Id.* at 1052. Regarding such a "value

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[1] *See* Appendix *infra.*

[2] Defendants do not contend, despite this characterization, that either the poem or any prior issue of *Granite* is obscene in the constitutional sense.

judgment as to . . . literary worth" as "intrinsic to the benefit being sought," the court could find no first amendment violation. *Id.* at 1052-53. Similarly, the court held that nothing in 20 U.S.C. §954 prevented state executive review of the funding decisions of a state agency established under that provision, and that such review was not only permitted but required by New Hampshire law. *Id.* at 1053-54.

In this appeal the plaintiffs have chosen not to pursue their statutory claims and ask us only to review that part of the district court's decision holding that their complaint alleged no first amendment violation.

There is no question that this case is properly before us. The plaintiffs' claim that the defendants' reversal of the grant awarded to *Granite* by the Commission stifled free expression raises a substantial federal question for which jurisdiction is plainly afforded by 28 U.S.C. §1343 (3) and 42 U.S.C. §1983. *Cf. Hagans* v. *Lavine,* 415 U.S. 528, 534-38 (1974). Moreover, the claim that as a result of the defendants' action *Granite* was forced to curtail and delay further publishing endeavors was enough to demonstrate that at least the publisher, Granite Publications, had a " 'personal stake in the outcome' such as to 'assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.' " *O'Shea* v. *Littleton,* 414 U.S. 488, 494 (1974), *quoting Baker* v. *Carr,* 369 U.S. 186, 204 (1962). That Granite Publications is a corporation has no bearing on its standing to assert violations of the first and fourteenth amendments under 42 U.S.C. §1983. *See Grosjean* v. *American Press Co.,* 297 U.S. 233, 244 (1936) . Since we thus find a justiciable controversy between Granite Publications and the defendants under 28 U.S.C. §1343 (3) and 42 U.S.C. §1983, we find it unnecessary to consider either whether there is jurisdiction under 28 U.S.C. §1331, with its "amount in controversy" requirement, or whether any of the other plaintiffs besides the publisher have standing. *Cf. Doe* v. *Bolton,* 410 U.S. 179, 189 (1973).

Nor is there any question that if defendants violated the first amendment, federal injunctive relief would be appropriate.

The defendants have advanced no administrative remedy that must be exhausted before plaintiffs can assert their first amendment claim in federal court. If refusal of aid to *Granite* restrained freedom of speech, it would be no answer that *Granite* could seek funds directly from the National Endowment for the Arts under 20 U.S.C. §954 (c), *cf Southeastern Promotions, Ltd.* v. *Conrad,* 420 U.S. 546, 556 (1975), or that it could ask the National Endowment to cut off further funding of the New Hampshire Commission under 20 U.S.C. §954 (h), even assuming that that provision were applicable to the alleged violation, *cf.* Van Alstyne, *The First Amendment and the Suppression of Warmongering Propaganda in the United States: Comments and Footnotes,* 31 Law and Contemp. Prob. 530, 535 (1966) ("[T]he remedy of silence is generally not the way of the first amendment."). Nor are the plaintiffs barred from equitable relief by any adequate remedy at law. If the decisional process leading to denial of funds to *Granite* violated the first amendment, as plaintiffs allege, appropriate relief would include an injunction ensuring that the violation does not recur, whether or not *Granite* showed itself to be threatened by recurring violations. *See* Sedler, *Standing to Assert Constitutional Jus Tertii in the Supreme Court,* 71 Yale L.J. 599 (1962).

We turn, then, to the merits of the plaintiffs' first amendment claim. We do not, of course, understand plaintiffs to suggest that public funding of the arts is unconstitutional. Such a broadside attack would be undercut by the Supreme Court's interpretation of the first amendment in *Buckley* v. *Valeo,* 44 U.S.L.W. 4127, 4154-55 (U.S. Jan. 30, 1976). There the Court held that the public financing of political campaigns "furthers, not abridges, pertinent First Amendment values. . . ." *Id.* at 4154. The plaintiffs' claim is rather that a decision not to fund a particular arts project such as *Granite* based on nothing more than personal preferences constitutes a prior restraint of free expression. While they would not, apparently, subject public funding decisions to the full panoply of procedural safeguards applicable to official actions regulating expression in public places, *see, e.g., Southeastern Promotions, supra,* they urge that "narrow standards and guidelines" are constitutionally required to ensure that funding decisions be based on "literary or artistic

merit" rather than on the decision maker's "prejudices or his disagreement with what is being said . . . ." While this argument has some attraction, we find it ultimately unpersuasive.

The plaintiffs' reliance on the prior restraint doctrine is, in our view, mistaken. The premise of that doctrine is that "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content[,]" *Police Department of Chicago* v. *Mosley*, 408 U.S. 92, 95 (1972), at least where the expression so restricted is protected "speech" within the first amendment, *cf. Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 571-72 (1942). It is to assure adherence to this principle that courts have required discretionary official action regulating expression to be accompanied by "rigorous procedural safeguards," *Southeastern Promotions, supra*, at 561, including prompt judicial review, *id.* at 560; *Freedman* v. *Maryland*, 380 U.S. 51, 58-59 (1965). But public funding of the arts seeks "not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge" artistic expression. *Buckley* v. *Valeo, supra*, at 4154. A disappointed grant applicant cannot complain that his work has been suppressed, but only that another's has been promoted in its stead. The decision to withhold support is unavoidably based in some part on the "subject matter" or "content" of expression, for the very assumption of public funding of the arts is that decisions will be made according to the literary or artistic worth of competing applicants. Given this focus on the comparative merit of literary and artistic works equally entitled to first amendment protection as "speech", courts have no particular institutional competence warranting case-by-case participation in the allocation of funds. *See Presidents Council* v. *Community School Board*, 457 F.2d 289 (2d Cir.), *cert. denied*, 409 U.S. 998 (1972).

There is, to be sure, a close resemblance between a governmental program directly subsidizing artistic projects and productions, and a governmental plan to construct and maintain an auditorium with public funds and to schedule dramatic and other artistic performances therein. And the Supreme Court has held that a municipal decision refusing to schedule a particular production in its auditorium on grounds of obscenity was a prior restraint of expression subject to the traditional procedural safeguards. *Southeastern Productions, supra.*[3] But we think there are significant differences between the two cases. First, the Court in *Southeastern* chose to view a public auditorium "as if it were the same as a city park or street . . ." *Id.* at 570 (Rehnquist, J., dissenting). Such an approach finds justification in the tradition of freedom from government interference with expression in public places in our society. *See, e.g., Shuttlesworth* v. *City of Birmingham*, 394 U.S. 147 (1969). But there is no similar tradition of absolute neutrality in public subsidization of activities involving speech. As the Supreme Court has observed. "Our statute books are replete with laws providing financial assistance to the exercise of free speech, such as aid to public broadcasting and other forms of educational media, 47 U.S.C. §§390-399, and preferential postal rates and antitrust exemptions for newspapers, 39 CFR §132.2 (1975); 15 U.S.C. §§1801-1804." *Buckley* v. *Valeo, supra*, at 4155 n.127.[4]

Second, while it may be feasible to allocate space in an auditorium without consideration of the expressive content of competing applicants' productions, such neutrality in a program for public funding of the arts is inconceivable. The purpose of such a program is to promote "art", the very definition of which requires an exercise of judgment from case to case. Moreover, money is a more flexible instrument than a public building: an applicant may receive varying amounts depending upon his needs and the promise of his work; similarly, the quantity of available funds may vary. Solutions that may work for an auditorium, such as scheduling on a fist-come-first-served basis or upon a prescribed showing of likely box-office success (if that is

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[3] Although the Court failed to confront squarely the problem of how a municipality is to resolve irreconcilable conflicts between multiple applications for use of the same facility at the same time, we think it implicit in the Court's disposition of the case that the decision must not turn on subjective official preferences. The opinion leaves it unclear, however, whether either of the Chattanooga facilities to which "Hair" was denied access went vacant during the period "Hair" applied for.

[4] We take notice, in addition, of the myriad federal grant programs for scientific and scholarly research. *E.g.*, 20 U.S.C. §§461-65 (National Defense Fellowships); *id.* §§134 *et seq.* (graduate programs — grants and fellowships); 42 U.S.C. §§1861 *et seq.* (National Science Foundation).

a solution),[8] are simply not available to a program for funding the arts. If such a program is to fulfill its purpose, the exercise of editorial judgment by those administering it is inescapable.

Plaintiffs contend nonetheless that while some consideration of content may be necessary, particular decisions should be required to follow "narrow standards and guidelines" that will insulate the result from the prejudices of the decision-maker. *See Shuttlesworth* v. *City of Birmingham, supra,* at 150-51. Presumably these standards and guidelines would elaborate the statutory standard of artistic and cultural significance, although just how they would further refine that standard is unclear. But however the standards are phrased, we think it would be unwise to require an objective measure of artistic merit as a matter of constitutional law. The Supreme Court has said that "[e]ach medium of expression . . . must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems [,]" *Southeastern Promotions, supra,* at 557, and it might be added that each form of governmental involvement in free expression must be similarly assessed. Attitudes toward art change, and even at one time, "it is . . . often true that one man's vulgarity is another's lyric. . . . " *Cohen* v. *California,* 403 U.S. 15, 25 (1971). In the absence of ascertainable principles by which to define artistic merit, we see no reason to demand that official discretion in this area be hedged by "narrow, objective and definite standards", *Shuttlesworth* v. *City of Birmingham, supra,* at 151. This is not to say that the standard of artistic merit is not an important goal, *see Accuracy in Media, Inc.* v. *FCC,* 521 F.2d 288, 297 (D.C. Cir. 1975), *petition for cert. filed,* 44 U.S.L.W. 3441 (U.S. Feb. 3, 1976) (No. 75-977) (viewing as "hortatory" the requirement of "strict adherence to objectivity and balance" in public broadcasting), but only that it and guidelines elaborating it do not lend themselves to translation into first amendment standards.

What is perhaps most troubling about this case is not that

[8]Compare the Federal Communications Commission's practice of allocating the public airwaves to broadcasters according, in part, to their success in meeting the needs and interests of the viewing or listening public as measured in public surveys, *see Policy Statement Concerning Comparative Hearings Involving Regular Renewal Applicants,* 22 F.C.C. 2d 424, 426 (1970); *Policy Statement on Comparative Broadcast Hearings,* 1 F.C.C. 2d 393, 397 (1965).

Granite should be denied public support, but that the denial should be based on a reading of just one poem in a back issue, without consideration of the overall quality of the publication either alone or as compared to competing grant applicants. But we doubt that this problem has a constitutional solution. *Granite's* claim of arbitrary treatment at the hands of the Governor and Council is essentially a claim of denial of due process. Yet in the absence of any right to public support of private expression, it seems unlikely that *Granite* has a sufficient "liberty" or "property" interest in a favorable decision to be able to claim a right to procedural regularity under the fourteenth amendment. *See e.g., Goss* v. *Lopez,* 419 U.S. 565, 572-76 (1975), *cf. Morrisey* v. *Brewer,* 408 U.S. 471, 481 (1972).[9] And even if this hurdle were surmountable, it is difficult to say what process would be appropriate in this context. Given the ultimate necessity of subjective judgment, we doubt that the advantages of a hearing or statement of reasons would justify the cost, or that an explicit finding of insufficient artistic merit would have any more than cosmetic significance. In short, if the consideration *Granite* received was inadequate, it must look elsewhere than to the Constitution for relief.[7]

[9]There is no claim that the initial decision by the Governor and Council approving the $750 grant gave the publisher a vested interest in that amount. And in light of the established practice of executive review of grants exceeding $500, plaintiffs cannot assert any property entitlement arising directly from the Commission's unreviewed decision. *Cf. Perry* v. *Sindermann,* 408 U.S. 593, 602-03 (1972).

[7]That the Governor and Council should reverse the Commission does not in itself seem to us to raise a constitutional issue. While it may be argued that such a selective veto embodies the evils of governmental interference with expression without the justification of a necessary editorial function, *see* Canby, *The First Amendment and the State as Editor: Implications for Public Broadcasting,* 52 Texas L. Rev. 1123, 1134 (1973), we see little advantage to first amendment values in demanding that a single governmental agency have absolute and unreviewable discretion in allocating funds. It is ultimately the prerogative of elected officials to decide when and how to spend the tax dollar, and those administering grant programs cannot ignore the importance of continued legislative and executive confidence in their judgment. *Cf.* Jaffe, *The Illusion of the Ideal Administration,* 86 Harv. L. Rev. 1183 (1973). There may, of course, be good reason to leave the decision to an agency whose members are familiar

A claim of discrimination would be another matter. The real danger in the injection of Government money into the marketplace of ideas is that the market will be distorted by the promotion of certain messages but not others. To some extent this danger is tolerable because counterbalanced by the hope that public funds will broaden the range of ideas expressed. *See Buckley* v. *Valeo, supra.* But if the danger of distortion were to be evidenced by a pattern of discrimination impinging on the basic first amendment right to free and full debate on matters of public interest, *see New York Times Co.* v. *Sullivan,* 376 U.S. 254, 270 (1964), a constitutional remedy would surely be appropriate.* On where to draw the line, reasonable minds may differ. But in our view the refusal here to promote a magazine on the ground that it has published a poem entitled "Castrating the Cat", which contains language and imagery that some may find offensive, falls short of the kind of discrimination that justifies judicial intervention in the name of the Constitution. *Cf. Close* v. *Lederle,* 424 F.2d 988 (1st Cir.), *cert, denied,* 400 U.S. 903 (1970).

Affirmed.

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with the arts and relatively removed from political pressures. Yet there is also something to be said for having decisions made in the open, where they can be subjected to public scrutiny and debate, rather than "behind a screen of informality and partial concealment that seriously curtails opportunity for public appraisal and increases the chances of discrimination and other abuse. . . ." Emerson, *The Doctrine of Prior Restraint,* 20 Law & Contemp. Prob. 648, 658 (1955). The question is not, in any case, "so free from doubt that courts should impose an inflexible response as a matter of constitutional law. . . ." *Public Research Interest Group* v. *FCC,* 522 F.2d 1060, 1067 (1st Cir. 1975).

Whether Congress or the New Hampshire legislature contemplated or authorized the power of review that was exercised here is another matter. The district court ruled that there was no statutory violation, 397 F. Supp. at 1053-54, and as this ruling is not challenged here, we have no occasion to pass on it.

*We agree with the district court that distribution of arts grants on the basis of such extrinsic considerations as the applicants' political views, associations, or activities would violate the equal protection clause, if not the first amendment, by penalizing the exercise of those freedoms. 397 F. Supp. at 1052; *see Perry v. Sindermann,* 408 U.S. 593, 597 (1972), and cases cited therein.

Michael McMahon

CASTRATING THE CAT

— It is better to marry than to burn —
St. Paul

you may keep both balls preserved in a jar
on the mantle piece

he will be tamer more loving
to his keepers

he will not stray after cat cunt
and his urine will not smell
should he spray the mattress

— a simple swipe of scalpel
along the scrotum
and it is done —

do not let the image of your own hulk
drawn down a bannister of razor blades
finger the inside of your sac

think of him as a tenor in the choir

— and it is done
the nurse washes her hands of him
yes she smiles we clipped his wings —

as above the errors flesh is heir to
like St. Simeon on his desert pole
unwashed in rags
who picked up each worm that fell
from his arm bid it eat and put it back